IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT,
Plaintiff in Error,
vs
G. KAUFMAN,
Defendant in Error.

No. 866.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

MALONY & COBB.
Attorneys for Defendant in Error.

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The plaintiff in error has not served his brief at this time, and should the same be served hereafter, within the time required by the rule, it will be too late then to brief the case for the defendant in error before the submission day. We therefore proceed to show why the judgment of the lower court should be affirmed.

There are five assignments of error. The first (Rec. p. 51) complains of the action of the court in excluding from the jury the deed from Thompson and wife to O. H. Adsit. We object to the consideration of this assignment because the

point was not saved by any proper exception in the bill. (Rec. pp. 18 to 20.) Nothing is shown in the bill upon which the court could say that the objection was wrongly sustined, and this defect is not supplied by what is set out in the assignment.

But if the assignment is entitled to be considered, then it should be overruled. The deed was not proved as at common law, and was not acknowledged as required by law. This is evident from the record p. 20. But this ruling is wholly immaterial in any event, as will be shown by a consideration of the case made, and the ruling of the court upon the pivotal question therein.

The action was to recover rents alleged to be due and owing plaintiff, Adsit, by the defendant, Kaufman, for the use and occupation of an undivided half interest in Lot 4, Block 4, of the town of Juneau, from April 1st, 1894, to July 1st, 1896, by permission of the plaintiff, who thereby became liable to pay him the reasonable value of such premises, viz: $650. (Rec. pp. 7-9).

The answer admitted the present ownership of plaintiff; but denied his ownership during the time mentioned; it admitted that defendant occupied the premises during the time alleged, but specially denied that it was by permission of the plaintiff, or under him, or in recognition of his title, but that during said time, said premises were in possession of another person of whom defendant rented, and who claimed adversely to Adsit. [Rec. pp. 9-10.] The reply denied this. [Rec. p. 13.]

It will thus be seen that the action was upon an implied contract; that the answer put in issue this implied contract, and set up occupancy of the premises under a contract with another, and this was put in issue by the reply.

The evidence showed that in April, 1894, J. F. Malony was

in possession of the premises mentioned and rented the same to Kaufman, the defendant. That at that time there was a suit pending in the District Court of Alaska for the possession of said premises, wherein O. H. Adsit was plaintiff and J. F. Malony was defendant; that the plaintiff prevailed in said action, and in 1897 obtained possession under said judgment. John G. Heid, as attorney for Adsit, served a notice on Toklas & Kaufman to pay the rent to Adsit. When this notice was served is not shown. (Rec. p. 40.) Mr. Adsit testified that the defendant never got permission from him to occupy the premises; that defendant rented of Malony; that he never rented to defendant, and that he never had possession of the premises at any time until 1897. (Rec. p. 39.)

Under this evidence the court instructed the jury to find for the defendant, and this ruling is the matter complained of in the other assignments of error.

The action of the lower court was manifestly right, both in principle and authority. If Kaufman had paid the rent to Adsit, he would still have been liable to Malony of whom he rented; for a tenant cannot dispute his landlord's title. If Adsit had sued Kaufman for the possession of the property and damages for withholding, as he might have done, Kaufman could have vouched in Malony, his landlord, and stepped out of the case. But the action of Adsit was against Malony, the real party who was withholding his property. He did no ask for damages for withholding the possession, however. Had he done so, improvements could have been set off against the damages. He waits until he has ousted Malony and then seeks to compel Kaufman to pay his rent a second time.

But this was not the question ruled by the trial court. That question was: Can one suing upon an implied contract recover upon proof of a tort?

Dixon vs. Ahern, 24 Pac. Rep., 598. and S. C., 24 Pac. Rep., 337, is on all fours with the case at bar. There it was held

that to recover for use and occupation of lands, it is necessary to show that the relation of landlord and tenant existed between the parties during the time of the occupation. A mere trespasser cannot be held liable in such an action. See also—

Pico vs. Phelan, 19 Pac. Rep., 186. (California.)

Espey vs. Fenton, 5 Ore., 423.

Lloyd vs. Hough, 1 How., 153.

Hill vs. United States, 149 U. S., 593.

These authorities could be greatly multiplied, but we do not deem it necessary to burden the Court with further citations. We respectfully submit that the judgment of the lowert court should be affirmed.

MALONY & COBB.
Attorneys for Defendant in Error.